

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Petition for Declaratory Ruling that AT&T's
Phone-to-Phone IP Telephony Services are
Exempt from Access Charges

WC Docket No. 02-361

COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

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TABLE OF CONTENTS

	Page
SUMMARY	i
I. INTRODUCTION	1
II. GLOBAL CROSSING SUPPORTS DECLARATORY RELIEF IN THIS INSTANCE.....	3
A. Voice over IP is an Important and Evolving Technology.....	4
B. LEC and State Actions are Increasing Uncertainty and Inhibiting the Growth of IP-Based Services.....	5
C. The Commission Should Act Quickly to Declare All IP Telephony “Off Limits” to Access Charges and to Preempt State Authority Until the Commission Can Address IP Telephony in a Rulemaking.....	7
III. IP-BASED SERVICES HISTORICALLY HAVE BEEN SUBJECT TO THE ESP EXEMPTION AND SHOULD CONTINUE TO BE EXEMPT AT THIS TIME.....	8
A. IP-Based Services are Enhanced Services	8
B. The Report to Congress	11
IV. LECS MAY NOT DECIDE FOR THEMSELVES WHETHER TO SUBJECT IP TELEPHONY TO ACCESS CHARGES	13
V. REGULATION OF VOIP WOULD BE POOR PUBLIC POLICY	16
VI. CONCLUSION.....	17

SUMMARY

Global Crossing supports the AT&T Petition, and urges the Commission to move decisively to protect all Internet-protocol-based telephony services (“IP Telephony” or “Voice over IP (“VoIP”)) from *de facto* regulation unless and until such time as the Commission addresses the unique characteristics of IP Telephony in a rulemaking proceeding. The Commission’s recent restraint is being exploited by LECs seeking to arrogate unto themselves the power to regulate IP Telephony services.

Global Crossing has invested tens of millions of dollars to upgrade its network to provide carrier-class services using IP transmission protocols. This network can be used to carry a significant portion of Global Crossing’s future growth in new services. More importantly, we are only beginning to see the applications that may be possible with IP transmission. IP transmission enables the voice communication to be combined with additional enhanced functionalities, such as perhaps specialized ring tones, electronic “business cards” or other features that are hard to imagine today. Thus, even if VoIP services may appear rudimentary in their present functionalities, the Commission must be careful not to hold back the natural development of these services by imposing inflated costs and outdated regulatory models on this interconnection.

The FCC needs to act, and to act quickly, to clear the regulatory field for VoIP services as it intended, and to prevent its “hands off” policy from being undermined by the actions of others. Silence at this time could result in *de facto* regulation of VoIP as a basic service.

In addition, in order to dispel any controversy, the Commission should declare that any unilateral attempt by a LEC to impose access charges on IP Telephony is *per se*

unlawful. The Commission should direct any LEC that believes an IP Telephony service is subject to access charges to file a formal complaint or a petition for declaratory ruling with the FCC, and should prohibit an ILEC from billing access charges while its complaint or petition is pending.

Finally, at least until the Commission has an opportunity to address IP Telephony in a comprehensive rulemaking, the Commission should explicitly rule that the classification of IP Telephony is within its exclusive jurisdiction and thus subject to federal preemption. Preemption is necessary in order to ensure that national policies regarding interstate IP Telephony traffic are not frustrated by a patchwork of conflicting State decisions that could have the effect of undermining continued growth and innovation in IP Telephony services across the country. This action is necessary to preserve for the FCC the ability to determine the proper regulatory treatment of IP Telephony services going forward.

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Global Crossing North America, Inc. ("Global Crossing"), by its attorneys, hereby provides these initial comments on AT&T Corp.'s Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges ("AT&T Petition").¹ For the reasons explained below, Global Crossing supports the AT&T Petition, and urges the Commission to move decisively to protect all Internet-protocol-based telephony services ("IP Telephony" or Voice over IP ("VoIP")) from *de facto* regulation unless and until such time as the Commission adopts rules addressing the unique characteristics of IP Telephony in a rulemaking proceeding. The Commission should also declare any LEC attempts to assess such access charges are *per se* unlawful until the FCC has adopted rules.

I. INTRODUCTION

On October 18, 2002, AT&T filed a Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges. AT&T's Petition seeks a declaratory ruling that incumbent LECs may not assess access charges on AT&T's IP Telephony services and that AT&T is entitled to obtain local termination arrangements that are

exempt from access charges. In support of its Petition, AT&T states that it has upgraded its Internet backbone network to provide adequate quality voice over IP transmissions.² According to the Petition, AT&T initially offered a two-stage dialing arrangement for IP Telephony, in which a caller first accessed an IP gateway using a local phone number or an 800 number.³ Recently, AT&T began to use Feature Group D arrangements to route IP Telephony transmissions directly to its network.⁴ Because AT&T (like Global Crossing) is a Tier 1 Internet Service Provider (“ISP”) offering backbone services to other ISPs, when AT&T’s IP Telephony services are transported on its backbone, they traverse the Internet rather than a private IP-based transmission network.

With respect to termination of IP Telephony calls, AT&T states that it initially terminated calls using local business lines such as PRI (Primary Rate Interface) local trunks.⁵ However, some incumbent LECs have refused to provision the trunks as requested by AT&T.⁶ In other cases, incumbent LECs have billed access charges on a Calling Party Number (“CPN”) basis for traffic terminating over local reciprocal compensation interconnection trunks.⁷ One LEC even took the unlawful measure of intentionally routing traffic believed to be phone-to-phone IP Telephony to “dead air.”⁸ AT&T contends that these actions violate the congressional

¹ See *Public Notice*, DA 02-3184 (November 18, 2002).

² AT&T Petition at 18.

³ *Id.* at 18-19.

⁴ *Id.*

⁵ *Id.* at 19.

⁶ *Id.* at 19-21.

⁷ *Id.* at 20.

⁸ *Id.* at 21.

mandate to preserve the Internet free of unnecessary regulation and the FCC's long-standing exemption for all voice over IP services.⁹

AT&T requests that the Commission declare phone-to-phone IP Telephony to be exempt from access charges applicable to circuit switched interexchange calls. First, to the extent that AT&T's services utilize the Internet, rather than private IP networks, AT&T contends that access charges are an impermissible tax on the Internet.¹⁰ Second, regardless of how IP-based calls are transmitted, the incumbent LECs' unilateral imposition of access charges violates the Commission's "wait and see" policy of exempting all forms of VoIP until the Commission has adopted rules in a rulemaking proceeding.¹¹

II. GLOBAL CROSSING SUPPORTS DECLARATORY RELIEF IN THIS INSTANCE

Global Crossing supports AT&T's request for a declaratory order pertaining to voice over IP services. The Commission's recent restraint is being exploited by LECs seeking to arrogate unto themselves the power to regulate VoIP services. In order to preserve the Commission's own authority, it should act quickly to declare all forms of IP Telephony "off limits" to LEC access charges.

⁹ *Id.* at 24-26.

¹⁰ *Id.* at 5, 24-25.

¹¹ *Id.* at 6, 25-26.

A. Voice over IP is an Important and Evolving Technology

AT&T is by no means alone in making significant investments in voice over IP technologies. According to industry reports, VoIP investments have been growing rapidly.¹² Although IP-based services still command only a tiny portion of the market,¹³ there is a plethora of companies trying to make more efficient use of IP technologies. Indeed, Chairman Powell recently identified IP Telephony as one of the “key sources of revenue growth offering consumers a wealth of new benefits in the years to come.”¹⁴

For its part, Global Crossing has made substantial investments to develop a carrier class IP transport network, utilizing both its Internet backbone network and its own IP-based transport facilities. A key for Global Crossing was the deployment of a packet switched network robust enough to accept originating traffic from end users and carriers in multiple protocols, to convert the traffic into IP transmission and to terminate the traffic in a variety of protocols, depending upon the terminating LEC’s capabilities and the recipient’s requirements. For

¹² See “Study: Enterprise VoIP hits its stride,” NetworkWorldFusion (Mar. 27, 2002) (stating that according to a recent report from Cahners In-Stat, “the U.S. market for VoIP handsets reached \$1 billion in 2001.” The report also found that “the market for IP voice gear will reach \$5 billion by 2006 as IP phone systems start replacing ageing circuit-switched PBX systems over the next several years.”).

¹³ AT&T Petition at 27 (estimating VoIP traffic at 1-5% of interexchange traffic); see *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, FCC 02-310, ¶ 199 (Nov. 14, 2002) (declining to give substantial weight to the benefits of increased deployment of IP Telephony as a result of the merger because cable IP technology is “too novel” to make a reliable determination at this time); see also United States General Accounting Office, *Federal and State Universal Service Programs and Challenges to Funding*, at 22 (GAO-02-187 February 2002) (“some of the industry representatives we interviewed believed that IP telephony is not an immediate threat to universal service because there is so little IP telephony today”).

¹⁴ Prepared Remarks of Michael K. Powell, Chairman, FCC, delivered at the Goldman Sachs Communicopia XI Conference, New York, NY, October 2, 2002, at 2.

example, a customer could originate traffic via a circuit switched network, which could be converted to IP at a gateway (whether operated by Global Crossing or one of its carrier customers), and then routed through the network as an IP call for termination to the appropriate LECs. Global Crossing's network can receive this call either in TDM format and convert it to IP, or it can receive the call already in IP format. In either case, Global Crossing is able to identify the traffic and route the call to the terminating LEC using Global Crossing's IP network. Importantly, Global Crossing's network is designed to provide *carrier-class* quality for this IP traffic, rather than the crude quality of some early forms of VoIP.

Global Crossing went into production with its VoIP network in September 2000, with seven VoIP gateway centers in North America. Since that time, Global Crossing has invested tens of millions of dollars to upgrade its packet switching network with next generation VoIP equipment. Today, Global Crossing's VoIP network comprises 26 VoIP gateway centers in 12 countries, and has a capacity to handle traffic at the levels that today's carriers demand.

Global Crossing expects that a significant portion of its future growth in new services can be handled via its IP network. When the capabilities of packet switched networks meet and exceed the quality and reliability of circuit-switched voice communications, a whole host of advanced features will be enabled in addition to the traditional voice transmission. Global Crossing has invested in its IP network in order to be in a position to satisfy its customers' needs as communications capabilities become more robust.

B. LEC and State Actions are Increasing Uncertainty and Inhibiting the Growth of IP-Based Services

AT&T has documented in its Petition numerous unilateral actions by incumbent LECs to thwart VoIP development. Incumbent LECs are arrogating unto themselves the ability

to determine when, and at what cost, VoIP may be deployed.¹⁵ By refusing to provision local services, or by unilaterally imposing access charges on traffic routed over terminating arrangements (including reciprocal compensation trunks), the ILECs have exploited their control over local markets to create a competitive imbalance favoring their legacy exchange access revenues. If these actions are left unchecked, more incumbent LECs will quickly install themselves as the gatekeepers of IP Telephony deployment, to the detriment of a growing and heretofore competitive market in VoIP services.

Adding to this uncertainty is a patchwork of state commission decisions relating to IP Telephony. Increasingly, state commissions are issuing differing interpretations of the FCC's enhanced services rule and, consequently, reaching differing results on the circumstances under which access charges apply. For example, the Colorado PUC determined that access charges did not apply to IP Telephony.¹⁶ On the other hand, earlier this year, the New York PSC reached the opposite conclusion, finding that the IP Telephony service in question was subject to intrastate access charges.¹⁷

This uncertainty can have devastating effects on the development of VoIP services. As Global Crossing rolls out its VoIP platform and new services utilizing that platform, it cannot predict when incumbent LECs will seek to impose inflated access charges on its traffic. Nor can it predict which interconnection arrangements can be utilized without question and which will cause the incumbent LEC to refuse to provision and/or to block traffic routed through the arrangement. Even at this early stage, Global Crossing already has held back

¹⁵ See AT&T Petition at 19-21.

¹⁶ *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc.*, Decision No. C00-858, (Aug. 1, 2000) at 6-10.

in the expansion of its VoIP services due to concern over the treatment Global Crossing will encounter.

C. The Commission Should Act Quickly to Declare All IP Telephony “Off Limits” to Access Charges and to Preempt State Authority Until the Commission Can Address IP Telephony in a Rulemaking

Importantly, the above uncertainty largely is created by the FCC’s decision to remain silent over the past five years. Many incumbent LECs are exploiting the Commission’s silence after the *Report to Congress* as a license to assume the role of regulator themselves. The FCC needs to act, and to act quickly, to clear the regulatory field for VoIP services as it intended, and to prevent its “hands off” policy from being undermined by the actions of others. Silence at this time could result in *de facto* regulation of VoIP as a basic service.

At least until the Commission has an opportunity to address IP Telephony in a comprehensive rulemaking, the Commission should explicitly rule that the classification of IP Telephony is within its exclusive jurisdiction and thus subject to federal preemption. The reasons for this are largely the same as drove the Commission to find that it has exclusive jurisdiction over ISP-bound dial-up calls in its *Intercarrier Compensation* proceedings.¹⁸ Not only does IP Telephony frequently make use of the Internet, but in numerous instances these services are configured in such a way that the endpoints of the communication, whether local or interstate, are not readily discernible, as the AT&T Petition makes clear¹⁹ and the Commission

¹⁷ See Order Requiring Payment of Intrastate Carrier Access Charges, Case 01-C-1119, May 31, 2002.

¹⁸ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 – Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”) remanded by *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

¹⁹ AT&T Petition at 31.

noted in the *Report to Congress*.²⁰ Moreover, where the question is one of line drawing between interstate and intrastate spheres, that exercise is committed exclusively to the province of the FCC.²¹

Under these circumstances, the Commission should preempt the entire field, at least on an interim basis, in order to ensure that national policies regarding interstate IP Telephony traffic are not frustrated by a patchwork of conflicting State decisions that could have the effect of undermining continued growth and innovation in IP Telephony services across the country. This action is necessary to preserve for the FCC the ability to determine the proper regulatory treatment of IP Telephony services going forward.

III. IP-BASED SERVICES HISTORICALLY HAVE BEEN SUBJECT TO THE ESP EXEMPTION AND SHOULD CONTINUE TO BE EXEMPT AT THIS TIME

A. IP-Based Services are Enhanced Services

The treatment of protocol conversion as unregulated services has been a bedrock of federal policy since the *Computer II* proceeding in 1980. In *Computer II*, the Commission defined “basic service” as the provision of “pure transmission capability over a communications

²⁰ *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11545 (1998) (“[I]t may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate . . . or intrastate.”).

²¹ The line drawing question relating to the regulation of IP Telephony is essentially the same issue the Commission has dealt with repeatedly in the separations process. Recognizing the need for a nationwide, uniform system for this line drawing process, Congress enacted Section 2 of the Communications Act, which gives *exclusive* power over separations policy to the FCC. 47 U.S.C. § 152. Courts and the FCC have consistently held that, under the Act, the FCC has exclusive jurisdiction to determine what services are treated as interstate services. See *Hawaiian Tel. Co. v. Pub. Utils. Comm’n of Haw.*, 827 F.2d 1264, 1275-76 (9th Cir. 1987) (when the FCC has prescribed an applicable separation methodology, states are not free to ignore it); see also *Smith v. Ill. Bell. Tel. Co.*, 282 U.S. 133, 148-49 (1930) (requiring “separation of the intrastate and interstate property, revenues and expenses” of the LEC).

path that is virtually transparent in terms of its interaction with customer supplied information.”²²

Enhanced service, on the other hand, refers to:

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.²³

Basic services were to be offered under tariff, according to *Computer II*, while enhanced services were unregulated.

Since this time, the Commission has consistently held that services involving protocol conversion are unregulated.²⁴ Indeed, in *Computer III*, the Commission rejected a proposal to change its definition of enhanced service to require a “change in content” test, but rather decided to continue to label protocol conversion as an enhanced service.²⁵ As a result, since *Computer II*, all IP-based services have been treated as enhanced services involving protocol conversion.

A principal consequence of the treatment of IP-based services as enhanced services is that they are exempt from the imposition of access charges by LECs. In 1983, the Commission determined that ESPs, including ISPs, would be exempted from interstate access charges as the Commission instituted the access charge regime pursuant to the Divestiture of

²² *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 420 (1980).

²³ 47 C.F.R. § 64.702.

²⁴ *Petitions for Waiver of Section 64.702 of the Commission’s Rules by Pacific Bell et al.*, 58 RR 2d 1664, 100 FCC 2d 1057, 1087-88 (1985).

²⁵ *Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3081 (1987).

AT&T.²⁶ Five years later, after compiling a large record to consider whether the ESP exemption should remain in place, the Commission retained the exemption.²⁷ The Commission did so because the industry was entering a period of rapid change and volatility and its future viability would be burdened by any imposition of access charges.

In 1997, the Commission again confirmed the exemption as official Commission policy.²⁸ The Commission found that, without the exemption, “the pace of development of the Internet and other services may not have been so rapid.”²⁹ The Commission also noted that the information services industry was still evolving and that the imposition of access charges would frustrate the goals of the 1996 Act “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”³⁰ Indeed, the emergence of IP Telephony has developed, in large part, out of the hands-off approach by federal and state regulators endorsed by both Congress (in the 1996 Telecommunications Act) and the Commission. The Commission noted that Internet-based services did not use the public switched network in ways analogous to interexchange carriers and that LECs are adequately compensated by ESPs/ISPs through local access line charges (and if not, the local line charges were a matter to be taken up with State commissions).³¹ The Commission also underscored the fact that access charges, even after access reform – a process which still goes on today – still contained non-cost-based inefficiencies. Indeed, the

²⁶ *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983).

²⁷ *Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988).

²⁸ *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997).

²⁹ *Id.*

³⁰ *Id.*, quoting 47 U.S.C. § 230(b)(2) (emphasis added).

³¹ *Id.* at 16133-34.

Commission concluded that even were the access charge system to be “stripped of its current inefficiencies, it may not be the most appropriate pricing structure for Internet access and other information services.”³² In other words, the Commission recognized that the circuit-switched based access reform framework should not be blindly transferred to services for which access charges were not initially designed (which would include IP Telephony). The Commission, while instituting an inquiry proceeding “to consider the implications of information services more broadly,” stated, “[w]e intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more innovative and dynamic services than exist today.”³³ The Commission made clear that any changes to the exemption would be through a subsequent rulemaking.³⁴

B. The Report to Congress

As AT&T discusses in its Petition, in 1998, the Commission issued a Report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary examination of IP Telephony from a regulatory perspective.³⁵ In the *Report to*

³² *Id.* at 16134.

³³ *Id.*

³⁴ *Id.* Although the Commission did not invoke Section 251(g) of the Act when it affirmed in 1997 the ESP exemption and reiterating that any changes would have to be made through rulemaking, that provision is pertinent to consideration of the AT&T Petition. In particular, were the Commission to deny the relatively narrow relief AT&T’s Petition requests – which of course is to maintain existing Commission policies regarding the non-imposition of access charges on IP Telephony – it would, to some measure, be limiting or removing the ESP exemption. Section 251(g) obligates LECs to provide “exchange access” “to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that apply to such carrier on the date immediately preceding the enactment of the Telecommunications Act of 1996 under any ... regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission . . .” 47 U.S.C. § 251(g).

³⁵ *Report to Congress*, 13 FCC Rcd 11501 (1998).

Congress, the Commission discussed several forms of IP Telephony as examples and explained why such services, at least for now, did not contribute directly to the Commission's Universal Service funding mechanisms.³⁶ The AT&T Petition adequately recounts the details of the Commission's analysis of the various VoIP scenarios the Commission used as illustrations, and Global Crossing will not burden the Commission with an extensive restatement of that discussion here.

Nevertheless, it is important to note that in the *Report to Congress*, the Commission reaffirmed the central distinctions between "basic" and "enhanced" services (now, "telecommunications services" and "information services" under the 1996 Act). The Commission, in discussing Internet access and email, for example, explicitly noted that these services involve protocol conversion and/or interaction with stored information, and therefore were not telecommunications services.³⁷ Similarly, the Commission's discussion of "hybrid" services affirms that those services which offer enhanced functionality are in fact unregulated.³⁸

Also critical to the AT&T Petition, the *Report to Congress* unequivocally stated that the FCC believed it was premature to issue a definitive pronouncement on the regulatory status of phone-to-phone VoIP and that the FCC would not do so until a complete record could be established and specific phone-to-phone VoIP services could be examined.³⁹ The Commission, in fact, prefaced its entire discussion with the unequivocal caveat: "We do not believe . . . that it is appropriate to make any definitive pronouncements in the absence of a more

³⁶ Specifically, the Commission looked at phone-to-phone IP Telephony where the protocol conversion occurred within IP gateways, and computer-to-computer IP Telephony where the protocol conversion occurred within the users' equipment.

³⁷ *Id.* at 11538-11539.

³⁸ *Id.* at 11529.

³⁹ *Id.* at 11544.

complete record focused on individual service offerings.”⁴⁰ In effect, the FCC’s *Report to Congress*, while it may have “teed up” the issue of VoIP for future consideration, maintained the status quo of phone-to-phone VoIP as an unregulated information service.

IV. **LECS MAY NOT DECIDE FOR THEMSELVES WHETHER TO SUBJECT IP TELEPHONY TO ACCESS CHARGES**

The Commission stated in the *Report to Congress* that it would reserve making “definitive pronouncements” until it had a complete record addressing specific services. Despite this clear choice *not* to subject IP Telephony to any immediate regulation, several incumbent LECs have taken it upon themselves to impose regulation on VoIP services. The LECs’ positions are untenable, inappropriate and a blatant intrusion on the province of this Commission.

As long as IP-based services are treated as enhanced services, the exemption from access charges applies. The ILECs have no power to modify the Commission’s rule, which as discussed above, has been in place since the beginning of the access charge regime. However, rather than seeking a rule change that would subject IP Telephony to access charges, some ILECs have exploited the Commission’s deliberate inaction to assume for themselves the role of arbiter of what is a telecommunications service. Yet, only the Commission can classify VoIP as a telecommunications service. Unless and until the Commission finds specific VoIP services to be telecommunications services – which it has not done – the ESP exemption continues to apply to all IP-based services.⁴¹

⁴⁰ *Id.* at 11541.

⁴¹ LECs are free to petition the FCC, as U S West did, to classify a VoIP service as telecommunications. However, no LEC other than U S West has availed itself of this option.

Glossing over this important point, some LECs appear to be acting as if the *Report* nevertheless had in effect adopted a new rule which the LECs could enforce whenever the situation arose. Such an interpretation fails. The *Report* was not promulgated pursuant to notice and comment procedures, and does not satisfy the procedural requirements for rulemaking under the Administrative Procedure Act.⁴² Further, it is neither an “adjudication”⁴³ nor a “policy statement”⁴⁴ under applicable law. Indeed, the *Report* contains *no ordering clauses whatsoever*, and does not invoke any jurisdictional basis for its action. At most, the *Report* stands as a discussion of possible approaches the Commission might take should it decide to revisit its “hands off” policy toward IP Telephony. It cannot be the basis for applying new law to VoIP traffic.

The Commission itself has acted consistent with the proposition that the *Report to Congress* was non-binding – and *contrary* to what one would expect if the Commission had indeed adopted a new rule regulating some forms of IP Telephony. As AT&T notes in the Petition, U S West filed a petition in 1999 seeking to apply access charges to phone-to-phone IP

⁴² 5 U.S.C. § 553; see Section of Administrative Law & Regulatory Practice of the American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 Admin. Law R 1, 35-36 (Winter 2002) (outlining notice and comment procedures for rulemaking).

⁴³ 5 U.S.C. § 554; see also *Blackletter Statement* at 18 (“Adjudication is the agency process for issuing an order which resolves particular rights or duties”).

⁴⁴ See *Lincoln v. Virgil*, 508 U.S. 182, 197 (1993) (defining policy statements as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power”) (citing to *Chrysler v. Brown*, 441 U.S. 281, 301 (1979)); *Pacific Gas & Electric Co. v. Federal Power Com.*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (“The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy ... When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued”); see also *Blackletter Statement* at 32 (“failure to publish [a policy statement], either in the Federal Register or as described in 5 U.S.C. § 552(a)(2), denies the agency any possibility of relying on it to disadvantage a private party, unless that party has had actual notice of the agency’s position”).

Telephony, relying on the discussion provided in the *Report to Congress*.⁴⁵ To date, the Commission has taken no action in response to the petition; it has not even requested comment via a public notice. Similarly, in the *Report to Congress*, the Commission noted that the former America's Carriers Telecommunications Association (ACTA) had filed a petition to classify IP Telephony software and hardware providers as common carriers.⁴⁶ Although the Commission stated that it would act on the petition in a separate order, it does not appear that the Commission has taken any action with respect to the ACTA petition. Clearly, if the Commission had intended to initiate regulation of IP Telephony, it could have and likely would have acted on one or both of these petitions. Its deliberate decision not to act is most reasonably interpreted as an affirmation of the existing "hands off" policy toward the services.

In order to dispel any controversy, the Commission should declare that any unilateral attempt by a LEC to impose access charges on IP Telephony is *per se* unlawful. The Commission should direct any LEC that believes an IP Telephony service is subject to access charges to file a formal complaint or a petition for declaratory ruling with the FCC, and should prohibit an ILEC from billing access charges while its complaint or petition is pending. By requiring a proceeding be initiated before the Commission, the FCC can ensure (1) that it can develop an adequate record to apply existing law⁴⁷ and (2) that issues relating to IP Telephony can be addressed in a uniform manner by the agency. In addition, the Commission will prevent the imposition of access charges from acting as a deterrent to the introduction of new IP-based

⁴⁵ See AT&T Petition at 16-17.

⁴⁶ See *Report to Congress*, 13 FCC Rcd at 11541.

⁴⁷ A change in the law – such as application of access charges to information services– must occur through a rulemaking; it may not be conducted via adjudication.

services. This is particularly important while, as is the case now, the Commission's CALLS plan has not yet reduced access charges to cost-based levels.

V. REGULATION OF VOIP WOULD BE POOR PUBLIC POLICY

As noted above, in order to modify its policy toward IP Telephony services, the Commission must adopt rules pursuant to a rulemaking proceeding. Despite the Commission's unquestioned ability to initiate such an action, it should not proceed to regulate VoIP at this time.

Initially, as the Commission recognized in the *Report to Congress*, it is extremely difficult to regulate services or technologies which are changing rapidly. Before it ventures into such territory, the Commission must be sure "to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, *and is not likely to be quickly overcome by changes in technology.*"⁴⁸ Global Crossing submits that, even in the short time since the *Report to Congress* its definitions have already become outdated. Protocol conversion can occur along a continuum of software and hardware configurations. Already on the market are a variety of "gateway" devices, some of which convert signals at the customer premises, some that convert the signals within the phone itself, and some that rely on the telecommunications network to provide the appropriate conversion. Increasingly, it is difficult to determine which configurations involve the use of a "computer" to originate the call, as the Commission discussed in its "computer to computer" IP Telephony example. The classic "slippery slope" is a very real danger here, which the Commission itself recognized at the time of the *Report to Congress*.⁴⁹

⁴⁸ *Report to Congress*, 13 FCC Rcd at 11544 (emphasis added).

⁴⁹ *See, e.g., Report to Congress* at 11529 (with any interpretation in which "some information services are classified as telecommunications services, it would be difficult

More importantly, we are only beginning to see the applications that may be possible with IP transmission. IP transmission enables the voice communication to be combined with additional enhanced functionalities, such as perhaps specialized ring tones, electronic “business cards” or other features that are hard to imagine today. Thus, even if VoIP services may appear rudimentary in their functionalities today, the Commission must be careful not to hold back the natural development of these services by imposing inflated costs and outdated regulatory models on this interconnection.

For this reason, the Commission should be cautious in deciding when to initiate a rulemaking to address IP Telephony. Any rulemaking proceeding should be narrowly crafted to identify appropriate candidates for regulation without chilling the vibrant development of other IP Telephony services.

VI. CONCLUSION

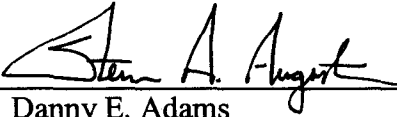
For the foregoing reasons, the Commission should promptly issue a declaratory order affirming that IP Telephony is exempt from access charges (and other regulation as a telecommunications service) unless and until the Commission adopts rules via a rulemaking proceeding. The Commission’s order should preempt all state regulation, at least on an interim

to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category”).

basis, and should require ILECs to file a formal complaint or a petition with the FCC if it believes a particular service is subject to access charges under the Commission's current rules.

Respectfully submitted,

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